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IN THE
Supreme Court of the United States

OCTOBER TERM, 1939

MONTGOMERY WARD & COMPANY *Petitioner,*

v.

No.  Civil

30

LUTHER M. DUNCAN *Respondent.*

RESPONSE TO MOTION TO DISMISS WRIT OF
CERTIORARI AND TO ALTERNATIVE MOTION
TO AFFIRM

J. MERRICK MOORE,
Little Rock, Arkansas;

E. OLIPHANT,
Chicago, Illinois,

Counsel for Petitioner.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1939

MONTGOMERY WARD & COMPANY.....Petitioner,

v.

No. 813—Civil

LUTHER M. DUNCAN.....Respondent.

RESPONSE TO MOTION TO DISMISS WRIT OF
CERTIORARI AND TO ALTERNATIVE MOTION
TO AFFIRM

I.

Respondent's motion to dismiss the writ of certiorari is evidently based upon paragraph 3 of Rule 7 of the Rules of this Court, where it is provided that "A motion by respondent to dismiss a writ of certiorari. * * * will be received if not based upon grounds already advanced in opposition to the granting of the writ of certiorari. * * *". Respondent's motion is not accompanied by any brief, and no grounds or reasons are set forth in the motion itself in support thereof. It is merely stated that "It is believed that the decision and judgment of the Circuit Court of Appeals in this cause are so clearly correct that, upon a reconsideration of the petition, as upon a rehearing, this Court will dismiss the writ; * * *".

The statement just quoted fails completely to advance any argument or to state any reason for respondent's conclusion that the decision and judgment of the Court of Appeals is so clearly correct that this Court should dismiss the writ; and it utterly fails to state (as required by paragraph 3 of Rule 7) any grounds not "already advanced in opposition to the granting of the writ of certiorari * * *." Prior to the granting of the writ of certiorari in this case respondent filed a brief in opposition thereto and fully contended in that brief that the decision of the Court of Appeals was so clearly correct that the writ should not be granted by this Court. The language above quoted from respondent's motion amounts merely to a general, and somewhat dogmatic, summing up of the arguments and conclusion contained in his opposing brief, and clearly advances no grounds not already advanced by counsel in opposition to the granting of the writ.

II.

The alternative motion to affirm the decision and judgment of the Circuit Court of Appeals is based upon paragraph 4 of Rule 7 where it is said "The Court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

Counsel make no claim that certiorari was sought for purposes of delay; and content themselves with the statement that the Court should affirm "on the ground and for the reason that the question on which the decision of the cause depends is of such nature as not to need or require further argument, there being no Federal cases directly in

point on the question involved, and representative cases shedding any light on the question having heretofore been cited in the brief in support of the petition for the writ and the brief in opposition thereto."

Conceding for argument's sake that paragraph 4 applies to certiorari and is not limited to appeals, although it refers only to appeals, there is nothing in the language just quoted that tends to bring the case within the rule. There is no statement that the question on which the decision of the cause depends is so unsubstantial as not to need further argument, nor are there any grounds or reasons stated that tend to support such a conclusion. On the other hand, this Court, prior to the granting of the writ, had before it petitioner's brief in support of the petition for the writ and respondent's brief in opposition thereto. We regard it as unnecessary to recall or repeat here the arguments contained and the grounds advanced for and against the granting of the writ, since they have been fully considered by the Court and since we assume that the writ would not have been granted had the Court not considered that substantial questions were involved.

Counsel's statement that the question on which the decision of the case depends does not require further argument because there are no Federal cases directly in point and because representative cases shedding light thereon have heretofore been cited in the briefs, falls far short of a statement that the question on which the decision depends is not substantial, and certainly would not require an affirmance of the case; nor does the statement carry any weight. It is a novel proposition to state that a question of law requires no additional argument because there hap-

pen to be no Federal cases directly in point and because representative cases from other jurisdictions have already been cited. The two last statements taken together would seem on the contrary to constitute the very necessity that calls for further argument.

III.

Counsel state in their motion that "The only other issue presented by the record herein is whether or not * * * movent (petitioner here) abandoned its motion for a new trial and estopped itself from thereafter resorting thereto by its action in the trial court in opposing the motion of its adversary to have an order entered on said motion and by there taking the position that the motion for a new trial passed out of the case on the granting of the renewed motion for a directed verdict."

The only statement contained in the entire record to the effect that petitioner opposed the motion filed by respondent with the trial court to have an order entered on the motion for a new trial and took the position that the motion had passed out of the case, is a self-serving statement contained in a second motion filed by respondent with the trial court asking that court to pass upon the motion for new trial. Aside from this statement appearing in respondent's motion, the record shows no pleading filed or appearance entered by petitioner for the purpose of resisting respondent's motion.

The trial court took the view with respect to respondent's motion that, having granted petitioner's motion for judgment notwithstanding the verdict, it would be premature and inconsistent with the court's action to pass upon

the motion for new trial at that time, and counsel for petitioner shared in these views and so expressed themselves at the time. But at no time did petitioner's attorneys express it as their opinion or take the position that petitioner's motion for new trial passed out upon the court's granting petitioner's motion for a judgment notwithstanding the verdict.

For the reasons above set forth, petitioner prays that this Honorable Court deny respondent's motion to dismiss the writ of certiorari and respondent's motion to affirm the decision and judgment of the Circuit Court of Appeals.

J. MERRICK MOORE,
Little Rock, Arkansas;

J. E. OLIPHANT,
Chicago, Illinois,

Counsel for Petitioner.